89-650

Supreme Court, U.S.
FILED
OCT 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States
October Term, 1989

RICHARD DUGGER, Secretary,
Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Petitioner,

v.

THEODORE CHRISTOPHER HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, Florida 32399

CHARLES M. FAHLBUSCH
Counsel of Record
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Suite N921
Miami, Florida 33128
(305) 377-5441

83 pp

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO GRANT A PRESUMPTION OF CORRECTNESS, UNDER 28 U.S.C. § 2254(d), TO A STATE COURT'S DETERMINATION THAT WITNESSES TESTIFYING AT A STATE COURT POST-CONVICTION RELIEF PROCEEDING WERE NOT CREDIBLE.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITATIONS iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE WRIT 12

CONCLUSION 22

TABLE OF CITATIONS

Pages

Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) 15

Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) 16

Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989) 4, 10, 12, 19

Harris v. State, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984) 4

Harris v. State, 528 So.2d 361 (Fla. 1988) . . . . . 5 - 6, 8 - 9, 18 - 19

Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985) 5

Marshall v. Lonberger, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) . 12 - 14, 20 - 21

Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) 15

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984) . 12 - 13, 15, 20 - 21

Strickland v. Washington, 466 U.S. 660, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . . . 8 - 9, 12

Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) 13, 20

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) . 12 - 13, 15, 20 - 21

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD DUGGER, Secretary,
Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Petitioner,

vs.

THEODORE CHRISTOPHER HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 874 F.2d 756 (11th Cir. 1989) and is reprinted in the Appendix hereto. (Pet. App. A. 1-15). The motion for rehearing was denied on August 17, 1989. (Pet. App. A. 16-17).

The decision of the United States District Court for the Southern District of Florida is unreported and reprinted in the Appendix hereto. (Pet. App. A. 18-24).

The decision of the Supreme Court of Florida, relevant to the issue raised herein, is reported at 528 So.2d 361 (Fla.

1988). The opinion is reprinted in the Appendix hereto. (Pet. App. A. 25-39).

The order of the Eleventh Judicial Circuit, in and for Dade County, Florida and findings at an evidentiary hearing in that court are relevant to the issue herein and are unreported. The Circuit Court's order and portions of the evidentiary hearing transcript are reprinted in the Appendix hereto. (Pet. App. A. 40-55).

JURISDICTION

The Eleventh Circuit Court of Appeals opinion was filed on May 16, 1989, and a motion for rehearing was denied on August 17, 1989. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 6th Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The 14th Amendment of the United States Constitution provides in relevant part: "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

28 U.S.C. § 2254(d) provides in relevant part:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and ade-

quate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

* * *

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

* * *

STATEMENT OF THE CASE

Following a jury trial in 1981, Respondent was convicted of first degree murder, burglary and robbery. *Harris v. Dugger,* 874 F.2d 756, 759 (11th Cir. 1989). (Pet. App. A. 4). The trial judge imposed the death sentence for the murder conviction, in accordance with the jury's advisory recommendation. *Id.* On direct appeal, the convictions and sentence were affirmed by the Supreme Court of Florida. *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied,* 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984). The facts of the murder, and the procedural history at trial and direct appeal, are set forth in the Supreme Court of Florida's opinion on appeal from denial of post conviction relief:

> "The victim, a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1981. She had died during the night from multiple stab wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was spattered over the walls and furnishings of the bedroom, living room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten."
>
> *Id.* at 789. At the time of the murder, Harris was living with the victim's granddaughter in the same neighborhood. He had previously been married to that granddaughter's sister. Harris had signed a written confession which was fully set forth in our prior opinion. He presented no evidence in his own behalf in the guilt phase of the trial.

> During the penalty phase, the state presented evidence that Harris had been previously convicted of robbery and that he was on parole at the time of the murder. At the conclusion of the penalty phase, defense counsel requested a continuance to bring Harris' ex-wife, other family members, and a minister from Jacksonville to testify in Harris' behalf. When the court reconvened, counsel advised the court the ex-wife was hospitalized and he had been unable to contact the minister. As a result of the unavailability of these witnesses, Harris presented no evidence in mitigation during the penalty phase. We affirmed the imposition of the death sentence and agreed that the following aggravating circumstances applied: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) the murder was committed while Harris was engaged in committing a robbery or burglary; and (4) the murder was especially heinous, atrocious, and cruel. We rejected the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner, but concluded that the improper finding of this aggravating circumstance did not require a new sentencing proceeding. *Id.* at 798.

Harris v. State, 528 So.2d 361, 361-62 (Fla. 1988) (Pet. App. A. 25-26).

Subsequently, Harris filed a petition for writ of habeas corpus in the Supreme Court of Florida, claiming that he was denied effective assistance of appellate counsel. *Harris v. Wainwright*, 473 So.2d 1246 (Fla. 1985). This claim was rejected. *Id.*

Harris then filed a motion for post-conviction relief in the state trial court, raising multiple issues. (Pet. App. A. 40-41). The trial court rejected fifteen (15) of these issues because they were procedurally barred in that they either: (1) "could have been and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial."; or (2) were previously ruled upon, against the defendant, by the Florida Supreme Court. (Pet. App. A. 40-41). However, the trial court held an evidentiary hearing on the remaining claims alleging ineffective assistance of trial counsel. (Pet. App. A. 40, 43 et seq.). The substance of the latter claims and the testimony of witnesses thereon is summarized by the Supreme Court of Florida as follows:

> . . . [Harris] asserts counsel was ineffective for failing to have presented certain mitigating evidence. He argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.
>
> He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in a blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.

Harris v. State, supra, at 528 So.2d 363-64 (Pet. App. A. 29).

The trial court judge who heard the testimony presented by these friends and relatives, found:

> With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdict.
>
> I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.
>
> They knew he had had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.

(Pet. App. 54-55).

Some of the testimony heard by the trial court at the evidentiary hearing is pertinent to the above finding. For example, witness Henry Fuller, the respondent's brother-in-law, had testified that he could see Harris as a role model for his children (Pet. App. A. 44) and that Harris would never hurt anybody. (Pet. App. A. 45). However, this witness did not know that the victim herein was a 73 year old woman whom Harris cut fifty (50) times. (Pet. App. A. 46). This witness did not know that Harris had been previously convicted of drug possession and robbing an elderly woman (in

the latter incident the woman's arm was broken). (Pet. App. A. 45-46). Moreover, his response as to how one reconciles the force and violence required in a robbery was: "So does love. . . ."! (Pet. App. A. 45-46).

Witness Carswell, who is a minister, testified that Harris was a good family man who attended the church and whom he would trust with his own family. (Pet. App. A. 48-52). However, this witness did not know about Harris' previous convictions of drug possession, assault and battery, or robbery. (Pet. App. A. 49-51). He didn't know the victim killed by Harris was the grandmother of the woman who had befriended him and who had given him a place to stay. (Pet. App. A. 29, 52). Carswell could not explain why Harris would inflict fifty knife wounds in order to take $30 from a member of the church. (Pet. App. A. 52).

Witness LaShawn Fuller, the Respondent's niece, testified that Harris was a good advisor for her during her career. (Pet. App. A. 48). This witness, however, was only fifteen years old at the time of Harris' sentencing (Pet. App. A. 47) and had no career!

The trial court, in accordance with the aforesaid findings, denied post-conviction relief on the grounds that no prejudice had been established and that "trial counsel did not commit any deficiency below the standards expected of counsel." (Pet. App. A. 40-41, 54-55).

Harris appealed the above denial to the Supreme Court of Florida. The Court, having first noted the trial court's findings, stated the criteria for granting relief, quoting from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in part, as follows:

> Further, "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the

> sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2068.

Harris v. State, supra, 528 So.2d at 363 (Pet. App. A. 28).

The Court then affirmed the denial of post-conviction relief, addressing the "good character" evidence argued by Harris and holding:

> To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the state to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse. These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three-year-old woman had six stab wounds and forty-one incision wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have affected the jury's recommendation or the sentence imposed by the trial judge.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29-30).

Respondent then filed a petition for writ of habeas corpus in the United States District Court for the Southern District

of Florida. (Pet. App. A. 18). He raised, *inter alia,* the same claims of ineffective assistance of counsel. (Pet. App. A. 20-22). The District Court denied the application for writ of habeas corpus. (Pet. App. A. 24). With respect to the claim of ineffective assistance of counsel, the District Court found:

> While the two lawyers representing Harris seemed to have thought that the other was responsible for the preparation for the penalty hearing, it is clear that some efforts were made to produce witnesses. More, perhaps, could have been done. But there is no proof that such additional efforts would have produced a different result. Perfection in preparation and presentation is not required by the United States Constitution.

(Pet. App. A. 23).

Harris then appealed to the United States Court of Appeals for the Eleventh Circuit. *Harris v. Dugger, supra.* (Pet. App. A. 1-17). The Court of Appeals first found that trial counsels' performance was deficient because they did not investigate Harris' "family, scholastic, military and employment" background. *Id.* at 763. (Pet. App. A. 12-13). The Court of Appeals then stated that as a result, the sentencing jury:

> . . . did not know that family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent loving man whose life was important to them.

Id. at 763. (Pet. App. A. 13).

The Court of Appeals, ignoring the state court's finding as to the credibility of these witnesses, concluded: "Because we find that a reasonable probability exists that a jury hearing

this [good character] evidence would have recommended life, Harris suffered prejudice from counsel's errors." *Id.* at 764. (Pet. App. A. 15). The Court of Appeals thus concluded that the writ of habeas corpus must be granted insofar as the death penalty is concerned, subject to the holding of a new sentencing proceeding within a reasonable period of time to be set by the district court. *Id.* (Pet. App. A. 15). In all other respects, the order of the district court was affirmed. *Id.*

REASON FOR GRANTING THE WRIT

THE FAILURE OF THE COURT OF APPEALS TO GRANT A PRESUMPTION OF CORRECTNESS, UNDER 28 U.S.C. 2254(d), TO THE STATE COURT'S DETERMINATION THAT WITNESSES TESTIFYING AT A POST-CONVICTION RELIEF PROCEEDING WERE NOT CREDIBLE, CONFLICTS WITH DECISIONS OF THIS COURT.

The United States Court of Appeals held that deficient conduct of counsel at the sentencing phase of Harris' trial caused Harris prejudice, because, "a reasonable probability exists that a jury hearing this evidence [of good character of the defendant] would have recommended life. . . ." *Harris v. Dugger, supra,* 874 F.2d at 764. (Pet. App. A. 15). Whereas the Court of Appeals treated the testimony of the defendant's family and friends as having proven good character, the state trial court judge, who heard this testimony in a post-conviction evidentiary hearing, expressly rejected the testimony of these witnesses, because she found them "incredible", based partially upon their demeanor on the witness stand and the inconsistencies in their testimony. (Pet. App. A. 54-55).

A state court's credibility determination as to witnesses is a factual issue which carries a presumption of correctness under 28 U.S.C. § 2254(d). *Marshall v. Lonberger,* 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). *See also, Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984). Ineffective assistance of counsel is "a mixed question of law and fact." *Strickland v. Washington,* 466 U.S. 660, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, a "state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of [28 U.S.C.] § 2254(d), ..." *Id.* A federal

court, on habeas corpus review, can not reject such a factual finding and come to its own conclusions on the basis of fact findings in conflict with those made by the state courts, unless, the federal court provides "a written explanation of the reasoning . . ." which led to the rejection of the state court's finding of facts. *Sumner v. Mata,* 455 U.S. 591, 593, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).[1] The Court of Appeals did not even mention the state court's finding that the witnesses testifying to the defendant's "good character" were not credible, let alone provide an explanation for the rejection of this finding. Thus, conflict exists between the Court of Appeals' decision and *Lonberger, supra, Sumner, supra, Witt, supra,* and *Rushen, supra.*

In *Lonberger,* in the state court trial on aggravated murder charges, the prosecution introduced evidence of Lonberger's prior guilty plea in an earlier attempted murder case. Evidence of the prior offense was relevant with respect to the propriety of the imposition of the death sentence. Lonberger maintained that his earlier guilty plea was involuntary. Prior to the trial on the murder charges, a state court hearing had been held to determine whether the prior plea was voluntary. Lonberger testified at that hearing. The state court, in finding that the prior plea was voluntary, thereby enabling its use in evidence at the subsequent murder trial, did not explicitly state that it found Lonberger's testimony lacking in credibility. Lonberger had testified that he had "copped out to aggravated battery" in

1 "The statute [28 U.S.C. § 2254(d)] explicitly provides that 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct.' Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported by the record' may the presumption properly be viewed as inapplicable or rebutted." *Sumner v. Mata,* 455 U.S. at 592.

the earlier case, but did not know of the other charges as to which he pled, including, *inter alia,* attempted murder. 459 U.S. at 432-33. The prosecutors attempted to impeach his testimony by introducing a copy of the indictment, which Lonberger denied having seen before. The prosecutors also emphasized that Lonberger must have heard of the attempted murder charge at the arraignment or in conversations with his attorneys. *Id.*

The Court of Appeals, in finding the plea involuntary, relied on Lonberger's testimony. *Id.* at 433. This Court found that the Court of Appeals' reliance on Lonberger's discredited testimony was erroneous:

> We are unsure whether the Court of Appeals' reassessment of the effect of respondent's testimony at the Ohio state trial court hearing was undertaken because of the failure of the trial court to make express findings as to respondent's credibility, or whether the Court of Appeals for the Sixth Circuit felt that it should assess for itself the weight that such evidence should have been accorded by the state trial court. In either event, we hold that it erroneously applied the "fairly supported by the record" standard enunciated in 28 U.S.C. § 2254(d).

459 U.S. at 433. Had Lonberger's testimony been believed, the state trial court obviously would have refused to permit the prior guilty plea to be introduced at the murder trial. *Id.* at 433-34. Thus, the state court's ruling allowing the use of the prior conviction was "tantamount to a refusal to believe the testimony of the respondent." *Id.* at 434. This Court then proceeded to conclude that the state court's finding regarding Lonberger's lack of credibility was fairly supported by the record and was entitled to deference by the federal courts.

The foregoing principles are seen again in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). That decision held that a state court's determination that a prospective capital sentencing juror was properly excused for bias was a finding of fact and was entitled to the presumption of correctness under 28 U.S.C. § 2254(d). This Court, quoting *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), noted that a finding regarding a venireman's state of mind "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." 469 U.S. at 428. Such determinations were entitled to deference both on direct review and in habeas proceedings. *Id.* The determination of "juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are 'factual issues' that are subject to § 2254(d)." *Id.* at 429. So too, in the instant case, the credibility determinations were "factual issues" entitled to deference under § 2254(d).

Similiarly, in *Rushen v. Spain*, 464 U.S. 114, 121 at n. 6, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984), it was held that, "Title 28 U.S.C. § 2254(d) provides that the state courts' determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us." *Rushen* involved a post-trial state court hearing in which it was concluded that ex parte communications between the judge and a juror did not prejudice the defendant and were harmless. The lower federal courts had erred in failing to defer to the presumptively correct state court finding that the jury's deliberations, as a whole, were not biased by the previously undisclosed communication of one juror's recollection. *Id.* at 121.

A federal court's deference to state court factual findings is at least as great as the deference a federal appellate court must grant to a federal district court's factual findings. *Witt, supra*, 469 U.S. at 428. In this context, *Amadeo v. Zant*, 486

U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988), must be noted. There, the federal appellate court rejected factual findings made by the federal district court in an evidentiary hearing. This Court, quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), emphasized that " '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " 100 L.Ed.2d at 262. Moreover, the Court of Appeals could not set aside the district court's factual findings where there was sufficient evidence in the record, considered in its entirety, to support those findings. 100 L.Ed.2d at 264. A state court's findings of fact are entitled to at least the same level of deference, if not greater.

In the instant case, the state trial court expressly found that the witnesses as to the defendant's "good character" were not credible, based both on their in-court demeanor and the inconsistencies in their testimony. (Pet. App. A. 54-55). The state court's finding is fairly supported by the record. The state court judge who heard these witnesses testify, found:

> With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdicts.
>
> *I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.*

> *They knew he had had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.*

(Pet. App. A. 54-55) (emphasis added).

The above findings are fairly supported by the record. For example, witness Henry Fuller testified that he could see Harris as a role model for his children (Pet. App. A. 44) and that Harris would never hurt anybody. (Pet. App. A. 45). However, this witness did not know that the victim herein was a 73 year old woman whom Harris cut fifty (50) times. (Pet. App. A. 46). This witness did not know that Harris had been previously convicted of drug possession and robbing an elderly woman (in the latter incident the woman's arm was broken). (Pet. App. A. 45-46). Moreover, his response as to how one reconciles the force and violence required in a robbery was: "So does love. . . ."! (Pet. App. A. 45-46).

Witness Carswell, who is a minister, testified that Harris was a good family man who attended the church and whom he would trust with his own family. (Pet. App. A. 48-52). However, this witness did not know about Harris' previous convictions of drug possession, assault and battery, or robbery. (Pet. App. A. 49-51). He didn't know the victim killed by Harris was the grandmother of the woman who had befriended him and who had given him a place to stay. (Pet. App. A. 52, 29). Carswell could not explain why Harris would inflict fifty knife wounds in order to take $30 from a member of the church. (Pet. App. A. 52).

Witness LaShawn Fuller testified that Harris was a good advisor for her during her career. (Pet. App. A. 48). This

witness, however, was only fifteen years old at the time of Harris' sentencing (Pet. App. A. 47) and had no career!

In addition to the trial judge's findings as to the demeanor and credibility of witnesses, the Supreme Court of Florida found the following:

> . . . He [Harris] argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.
>
> He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in a blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.
>
> To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the State to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29).

In reliance upon the above underlying factual bases the Supreme Court of Florida concluded:

> These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three-year old woman had six stab wounds and forty-one incision wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have affected the jury's recommendation or the sentence imposed by the trial judge.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29-30).

In contrast to the underlying factual findings utilized by the state courts, the Eleventh Circuit Court of Appeals concluded that prejudice had been established because:

> They [the jury] did not know that the family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent, loving man whose life was important to them. . . .

Harris v. Dugger, supra, at 763. (Pet. App. A. 13). The Court of Appeals entirely omitted any reference to the credibility of these witnesses as found by the state trial judge and the circumstances of the offense as found by the state Supreme Court. Instead of treating the "good character" testimony of Harris' friends and family as unbelievable and inconsistent, as the state courts did, the Court of Appeals treated it as unrebutted proof of good character. Thus rejecting the state court's factual finding for no reason, the Court concluded that the jury in Harris' sentencing phase would have recom-

mended life, thereby establishing prejudice. The Court of Appeals gave no reasons for its rejection of the State court's explicit findings. The Court of Appeals' decision is therefore in conflict with *Sumner, supra, Lonberger, supra, Witt, supra,* and *Rushen, supra.*

The significance of the foregoing goes well beyond the mere issue of whether certain witnesses are credible. The issue goes to the heart of the federal judicial structure. Inherent in the Court of Appeals' decision is the notion, repugnant to the state-federal judicial dichotomy, that federal courts alone are competent to determine the credibility of state court witnesses, witnesses who did not even appear in federal court. As noted by this Court in *Lonberger:*

> '. . . "Face to face with living witnesses the original trier of facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd v. Boyd,* 252 NY 422, 429.' *Id.,* at 339.
>
> We greatly doubt that Congress, when it used the language "fairly supported by the record" . . . intended to authorize broader federal review of state-court credibility determinations than are authorized in appeals within the federal system itself.

459 U.S. at 434-35. The federal appellate court in the instant case engaged in its own factfinding, egregiously ignoring the factual findings explicitly made by the state trial court. Such disrespect for the state judiciary's factfinding determinations manifestly repuditates the long line of authority enun-

ciated by this court. *Lonberger, supra; Witt, supra; Rushen, supra.* The mode of analysis utilized by the Court of Appeals therefore raises the spectre of further unwarranted intrusion into the state judiciary's domain.

CONCLUSION

Based on the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, Florida 32399

CHARLES M. FAHLBUSCH
Counsel of Record
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Suite N921
Miami, Florida 33128
(305) 377-5441

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD DUGGER, Secretary, Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General, State of Florida,

Petitioner,

vs.

THEODORE CHRISTOPHER HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, Florida 32399
CHARLES M. FAHLBUSCH
Counsel of Record
Assistant Attorney General
Department of Legal Affairs
Suite N-921
401 Northwest 2nd Avenue
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

Page

United States Court of Appeals Opinion, filed May 16, 1989 . . . . . A-1

United States Court of Appeals Order Denying Petition for Rehearing filed August 17, 1989 . . . . . A-16

Excerpts from United States District Court for the Southern District of Florida's Order Denying Petition for Writ of Habeas Corpus, filed July 6, 1988 . . . . . A-18

Florida Supreme Court Opinion filed July 1, 1988 . . . . . A-25

Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida, Order dated June 13, 1988 . . . . . A-40

Excerpts from June 7, 1988 Transcript of Evidentiary Hearing on Motion for Post Conviction Relief, in the Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida A-43

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5612

THEODORE CHRISTOPHER HARRIS,
Petitioner-Appellant,
versus
RICHARD DUGGER, Secretary, Department of Corrections,
State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,
Respondents-Appellees.

Appeal from the United States District
Court for the Southern District of Florida

(May 16, 1989)

Before: HILL, VANCE and ANDERSON, Circuit Judges.
HILL, Circuit Judge:

Theodore Christopher Harris, a Florida prisoner convicted of first-degree murder and sentenced to death, appeals the denial of his petition for the writ of habeas corpus. The issues presented are whether the appellant's confession resulted from an illegal arrest and police coercion, in violation of the Fourth and Fourteenth Amendments, and whether Harris' lawyers rendered ineffective assistance of counsel during the penalty phase of his trial, in violation of the Sixth and Fourteenth Amendments.

I.

The victim, Essie Daniels, a seventy-three year old woman, was found dead in her Miami home on the morning of March 22, 1981. An autopsy revealed that she had been stabbed approximately fifty times and had been beaten with a blunt instrument. Police officers found blood spattered over the walls and furnishings of the bedroom, living room and kitchen, indicating that Daniels had attempted to escape the assailant while she was being attacked. A subsequent criminal investigation focused on Theodore Harris as a suspect, and on April 14, 1981, the police arrested the appellant pursuant to a warrant. Harris first denied his involvement in the murder, but after a six hour interrogation, he confessed to having killed the victim.

Harris told the police that he had gone to the victim's home in order to rob her, not to kill her. Upon entering the home, however, Essie Daniels, carrying a kitchen knife in her hand, confronted Harris. A violent struggle ensued, and the victim struck the appellant with the knife first, severely lacerating his hand. Harris then seized the knife, whereupon he repeatedly stabbed the victim. After the attack ended, Harris proceeded to the victim's bedroom, emptied her pocket book, and took approximately $30.

On April 28, 1981, a Dade County, Florida, grand jury indicted Harris for murder in the first degree, as well as for

burglary with assault and robbery. Prior to trial, the defense moved to suppress the appellant's confession, and the judge held an evidentiary hearing. At that hearing, Harris argued that the confession had resulted from an unlawful arrest and police coercion. In attacking the arrest, the appellant relied on *Franks v. Delaware*, 438 U.S. 154 (1978), contending that the investigating police officer had made deliberate misrepresentations of material facts in the affidavit of probable cause used to obtain the arrest warrant.[1] The court rejected this claim, however, finding that *Franks* had not been satisfied since "there was no deliberate falsity or reckless disregard by the investigating police agencies . . . . Moreover, assuming arguendo, there even was a falsity or disregard, there remains sufficient contents within the warrant affidavit to support a finding of probable cause."

The appellant also challenged the legality of the confession by arguing that it was involuntary. Evidence at the suppression hearing established that at the time of arrest, Harris had a cast on his right forearm which interfered with his wrists being handcuffed behind his back, as police regulations required. So, the police handcuffed Harris' right elbow to his left wrist behind his back. The appellant re-

1 In *Franks*, the Supreme Court held "that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the fact of the affidavit." 438 U.S. at 155-56.

mained handcuffed while sitting in an aluminum chair throughout the six hour interrogation. Harris testified that during this time the police beat, tortured and threatened him to obtain his confession. However, police officers testifying for the state denied that Harris had been physically or emotionally abused in any way. The officers stated that Harris stayed calm, unemotional throughout the interrogation, that he never complained of discomfort or pain and did not request an attorney although receiving the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966), several times. The state court found the officers' version of the interrogation more credible and concluded that Harris had confessed voluntarily.

Harris neither testified nor did the defense call any witnesses during the guilt-innocence phase of the trial. The jury convicted the appellant of first-degree murder, burglary and robbery. During the penalty phase of the trial, the state presented medical testimony concerning the nature of the victim's injuries and the resulting pain that she had suffered. The state introduced additional evidence that Harris had previously been convicted of robbery and was on parole at the time of the murder. Harris presented no evidence in mitigation or rebuttal. Subsequently, the jury rendered a recommendation of death by a vote of eight to four, and the judge imposed the death penalty.[2] The Supreme Court of Florida affirmed the convictions and the death sentence. *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466

2 The trial court found the following aggravating circumstances: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) Harris committed the murder while engaged in a robbery or burglary; (4) the murder was especially heinous, atrocious and cruel; and (5) Harris committed murder in a cold, calculated and premeditated manner. The Supreme Court of Florida rejected the last aggravating circumstance as unsupported by the evidence. However, the court held that the improper finding did not require a new sentencing hearing. *Harris v. State*, 438 So.2d 787, 798 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984).

U.S. 963 (1984). The court agreed that Harris had not satisfied *Franks v. Delaware* in proving an unlawful arrest and found that the record supported the trial court's conclusion that the confession was voluntary. *Id.* at 793-94. Thereafter, Harris filed a petition for the writ of habeas corpus in the Supreme Court of Florida alleging ineffective assistance of appellate counsel which the court denied. *Harris v. Wainwright,* 473 So.2d 1246, 1247 (Fla. 1985).

The appellant then filed a motion for post-conviction relief in the state trial court pursuant to Florida Rule of Criminal Procedure 3.850. He alleged, *inter alia,* that his two trial lawyers, Alfred Williams and Pedro Echarte, had rendered ineffective assistance of counsel during the penalty phase of his trial by failing to investigate, prepare or present any mitigation evidence. The state court held an evidentiary hearing in June, 1988, at which Williams and Echarte testified. Both lawyers stated that neither one of them had properly investigated Harris' background. Neither lawyer had obtained Harris' school or military records. Neither one had traveled to Jacksonville, Florida, Harris' hometown, to meet the appellant's parents, sister, brother-in-law, niece, friends, employers and neighbors to learn whether they could offer beneficial mitigation evidence. In fact, the lawyers' testimony demonstrated that, prior to the day of sentencing, neither had performed any investigation in advance for the penalty hearing. Their testimony indicates that their failure to investigate occurred because each believed that the other was preparing the penalty phase of the trial:

> Q. Now, Mr. Williams, who was responsible for the preparation of the penalty phase of this case as between yourself and Mr. Echarte?
>
> A. Mr. Echarte.
>
> . . . .

> Q. Mr. [Echarte], between you and Mr. Williams, which of you was responsible for the preparation of the penalty phase in this trial?
>
> A. Mr. Williams.

Other testimony indicated that the lawyers employed an investigator to assist them in preparing the Harris case. However, no evidence demonstrated that Williams or Echarte ever received or relied on background information developed by the investigator concerning the penalty phase. Williams testified, for example, that he assumed that Echarte and the investigator were working jointly to develop mitigation evidence. But, Echarte testified to the contrary, stating that he neither assigned the investigator to research Harris' background nor did the work himself.[3]

As a result, the lawyers had no evidence to offer in mitigation at the commencement of the sentencing hearing on Saturday, September 26, 1981. Williams thus requested a

3 Williams gave the following testimony concerning the investigator, Gary Wayne:

> Q. Now, during the course of your preparation of the trial phase and the penalty phase, you were receiving reports from either Mr. Echarte or from your investigator, Mr. Wayne, that contacts were being made with family members, correct?
>
> A. Yes.
>
> Q. And that they were developing a background history for your client for the penalty phase?
>
> A. *That's what I assumed was taking place, yes.* (Emphasis added)
>
> Q. That's what they told you was taking place, was it not?
>
> A. Well, the penalty phase was assigned to Pedro [Echarte] and he was to work it up. I got reports in the interim that he had talked to certain people, certain things were coming, certain things were not developing.
>
> Q. They were not developing, but the efforts were being made to develop them by both your investigator and Mr. Echarte?
>
> A. As far as I know, yes.

But Echarte explained that his co-counsel's assumptions were incorrect:

> Q. Mr. Echarte, during the course of your representation of Mr. Harris, did you at any time confer with Mr. Harris' family?

continuance, which the court granted until Tuesday, September 29. In that time, the record demonstrates that the attorneys attempted to contact Harris' ex-wife and one of his Miami friends to obtain some mitigation testimony. However, the ex-wife's hospitalization in Jacksonville precluded her from appearing at the penalty hearing and the friend, according to Williams, refused to testify. The record is unclear as to whether the lawyers made any other attempts to contact witnesses. Thus, at the Tuesday hearing, no friends or relatives testified on Harris' behalf, and Williams explained the absence of family members to the sentencing jury in his closing statement by stating that Harris' "family has turned against him because he was accused of this act."

However, at the Rule 3.850 hearing in state court, the appellant contended that Williams had mischaracterized the Harris family's feelings about the appellant. Harris presented witnesses, including his sister, brother-in-law, niece, ex-wife and a minister, who stated that they would

> A. No.
>
> . . . .
>
> Q. Did you at any time during representation of Mr. Harris confer with or speak to any of Mr. Harris' former employers or friends?
>
> A. No.
>
> . . . .
>
> Q. Mr. Echarte, did you ever go to Jacksonville to visit the Harris family?
>
> A. No.
>
> Q. Did you ever visit the neighborhood where Mr. Harris grew up?
>
> A. I did not.
>
> Q. *Did you ever assign an investigator to do so on your behalf?*
>
> A. *I did not.* (Emphasis added)
>
> Q. Mr. Echarte, did you ever spend time sitting with Mr. Harris to discuss his background and his personal history in preparation for the penalty phase?
>
> A. I did not.

have gladly testified at the sentencing hearing on Harris' behalf. With the exception of Harris' ex-wife, who had been hospitalized at the time of the hearing, the witnesses blamed their absence on the fact that neither of Harris' lawyers nor the investigator had contacted them in regard to the penalty phase. The witnesses also stated that, given the opportunity, they would have described Harris to the sentencing jury as a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children. All of the witnesses found value in the appellant's life, despite his incarceration and prior criminal conduct. Echarte testified at the Rule 3.850 hearing that he would have presented these witnesses at sentencing had he known about their existence. Williams stated that the failure to seek out this evidence constituted ineffective assistance of counsel.[4]

The state trial court denied Harris' motion for post-conviction relief, finding that counsel had rendered effective assistance, and the Supreme Court of Florida affirmed. *Harris v. State,* 528 So.2d 361 (Fla. 1988). Harris subsequently filed a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District Court for the Southern District of Florida. The district court also denied relief, finding that the affidavit of probable cause did not violate *Franks v. Delaware* and that Harris had confessed voluntarily. The district court also concluded that Harris' lawyers had rendered adequate assistance of counsel during the penalty phase. This appeal ensued.

4 Williams' concessions might be construed as reflecting biac. On cross-examination, Williams stated his opposition to the death penalty. He was a public defender, had defended a number of capital cases and Harris was his only client to have reached death row. However, given the state trial judge's endorsement of the lawyer's ability during the Rule 3.850 hearing, we do not, and cannot, second-guess the credibility of Williams' statements. Moreover, because ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive.

II

A. The Confession

Appellant contends that the confession was the fruit of an illegal arrest because a police investigator submitted a false and misleading affidavit of probable cause. While not saying so expressly in the brief, Harris raises the *Franks* Fourth Amendment issue once again. However, Harris has fully and fairly litigated this claim in the state courts of Florida. Thus, under the principles of *Stone v. Powell*, 428 U.S. 465 (1976), federal habeas review of this claim is precluded. As the Court stated in *Stone*, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnotes omitted). Accordingly, the district court erred in considering the appellant's *Franks* claim. The Florida courts' conclusions that Harris' arrest comported with the Fourth Amendment resolved this issue. *See also Cardwell v. Taylor*, 461 U.S. 571 (1983) (holding the *Stone* preclusion applicable to confessions challenged on Fourth Amendment grounds); *Williams v. Brown*, 609 F.2d 216 (5th Cir. 1980) (*Stone* prevented federal habeas review of a *Franks v. Delaware* claim).[5]

Next, the appellant claims that the police engaged in a coercive, protracted interrogation, vitiating the voluntariness of his confession. Our analysis begins with the well-settled rule that the Due Process Clause of the Fourteenth Amendment prohibits the government's use of involuntary confessions. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Leon*

5 The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

v. Wainwright, 734 F.2d 770, 772 (11th Cir. 1984). A confession is voluntary if, under the totality of the circumstances, it is the product of the defendant's free and rational choice. *Id.* This means that the confession must not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, or by the exertion of any improper influence. *Id.* Although the ultimate issue of voluntariness is a legal question requiring independent federal determination, state court findings of fact are afforded a presumption of correctness under 28 U.S.C. § 2254(d).[6] *Miller,* 104 U.S. at 112. As the Court stated in *Miller,* "... subsidiary factual questions, such as ... whether in fact the police engaged in the intimidation tactics alleged by the defendant ... are entitled to the § 2254(d) presumption." *Id.*

In rejecting Harris' motion to suppress the confession, the state trial court found that the police had not threatened, beaten, tricked or harmed the appellant in any way and that pictures taken of him shortly after giving the confession confirmed the absence of physical harm. The court also concluded that Harris' demeanor throughout the interrogation remained calm, and that although he received three sets of *Miranda* warnings, he did not request an attorney. Also, the court found that Harris read and made corrections on his written confession, evidencing a desire to confess. Because these factual determinations are fairly supported by the record, we must afford them a presumption of correctness under 28 U.S.C. § 2254 (d). *Miller,* 474 U.S. at 112. Consequently, accepting the state court's findings as fact, we conclude that Harris gave a voluntary and reliable confession.[7]

6 28 U.S.C. § 2254(d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia ...."

B. Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right of effective assistance of counsel during a capital sentencing hearing. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Appellant claims that his lawyers' failure to investigate, prepare and present mitigation evidence tending to show his good character denied him this right. Our analysis under *Strickland* has two components: First, Harris must show that his lawyers rendered deficient performance by specifying acts and omissions which allegedly fell outside the wide range of professionally competent assistance. *Id.* at 687-90. Second, Harris must demonstrate that the deficient performance prejudiced the defense. *Id.* at 687. That is, the appellant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine our confidence in the outcome. *Id.* at 694.

The state contends that the appellant has failed to prove either deficient performance or prejudice. It argues that Williams and Echarte relied on their investigator in preparing for the penalty phase, and such reliance, as opposed to interviewing the witnesses themselves, was not an unreasonable performance.[8] As to prejudice, the state contends that the introduction of evidence of appellant's good character through testimony of his relatives and friends would have provided a "springboard" for the prosecutor to inquire

7 We also reject Harris' request for an evidentiary hearing concerning the voluntariness of his confession since he had a full and fair opportuity to present all of his evidence at the state court suppression hearing.

8 The state judge presiding over the Rule 3.850 hearing and the district judge found this argument to be persuasive in holding that Harris' lawyers had rendered effective assistance of counsel.

into Harris' numerous prior crimes. Those prior crimes include convictions for burglary, assault and battery, a drug offense and a robbery in which the appellant broke an elderly woman's arm by snatching her purse. In addition, Harris' military records disclose that he received an undesirable discharge from the Army. Thus, the state urges that Harris suffered no prejudice from the omission of mitigation evidence since the prosecutor was prevented from introducing evidence of Harris' unfavorable record.

An attorney is not obligated to present mitigation evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good. *Smith v. Dugger,* 840 F.2d 787, 795 (11th Cir. 1988). Moreover, the attorney is not necessarily required to investigate every evidentiary lead; an attorney's decision to limit his or her investigation may be reasonable under the circumstances. *Strickland,* 466 U.S. at 691. However, such decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect. Each lawyer testified that he believed that the other was responsible for preparing the penalty phase of this case. Thus, prior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total—and admitted—ignorance about the type of mitigation evidence available to them. Such ignorance precluded Williams and Echarte from making strategic decisions on whether to introduce testimony from Harris' friends and relatives. We conclude, therefore, that the lawyers rendered inadequate assistance of counsel. *See Blake v. Kemp,* 758 F.2d 523, 533 (11th Cir.), *cert. denied,* 474 U.S. 998 (1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.")

In reaching our conclusion, we reject the state's contention that counsel based a strategy on information supplied to them by an investigator. The record simply does not support the state's position. Williams, who admittedly did not investigate Harris' background, *assumed* that Echarte and the investigator were developing background information. However, Echarte's testimony that he neither labored with an investigator nor accomplished the work himself belies the accuracy of Williams' assumption.

Yet, if the failure to investigate did not deprive the appellant of beneficial evidence, there may be inadequate assistance but no prejudice and thus no constitutional deprivation. *Strickland,* 466 U.S. at 691-92. Here, the prejudice component in *Strickland* requires close scrutiny. It is critical to the reliability of a capital sentencing proceeding that the jury render an individualized decision. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978); *Armstrong v. Dugger,* 833 F.2d 1430, 1433 (11th Cir. 1987). Thus, the jury's attention should be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206. In this case, the sentencing jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant. They did not know that family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent loving man whose life was important to them. To the contrary, appellant's lawyer erroneously told the jury that Harris' family had "turned against him." Thus, the jury did not assess "the information needed to properly focus on the particularized characteristics of this petitioner. *Armstrong,* 833 F.2d at 1433.

Evidence tending to show Harris' good character might well have been beneficial to the defense. Many death penalty cases involve planned murders,[9] but here the evidence fails to show that the appellant set out to kill Essie Daniels when he entered her home. Instead, the appellant appears to have embarked on a weaponless burglary during which he was surprised by the victim who produced the knife and apparently struck the first blow. The murder was brutal, but the absence of murder as a part of the initial design may have rendered the circumstances of this crime somewhat less egregious in the minds of the jurors. Thus, evidence seeking to show the appellant's character as being good may have had a greater impact on a jury deciding whether to impose the death penalty for this crime—a burglary gone horribly awry—as opposed to one involving murder as the intended goal from the inception of criminal conduct.

It does appear that injecting Harris' character as an issue during sentencing was fraught with danger. Although the prosecutor told the jury that Harris committed murder while on parole, the introduction of evidence about Harris' character would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army. Nevertheless, on this record, we cannot conclude that effective counsel would have made a strategic decision to forego testimony about Harris' good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case. Indeed, one of Harris' lawyers conceded that he would have used the evidence had he known about it.[10] Testimony about the appellant's good character constituted the only means of showing that Harris

9 In *Strickland,* for example, the defendant planned and committed three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion and theft. 466 U.S. at 671-72.

was perhaps less reprehensible than the facts of the murder indicated. Because we find that a reasonable probability exists that a jury hearing this evidence would have recommended life, Harris suffered prejudice from counsel's errors.

We conclude that Harris' lawyers rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The writ of habeas corpus must be granted insofar as the death penalty is concerned, subject to the holding of a new sentencing proceeding within a reasonable period of time to be set by the district court.[11]

III

For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

10 There is no other conclusion available from this record than that Harris' character witnesses would have testified then, at the appellant's trial, as they do now.

11 In light of our holding, we need not reach appellant's contention that his trial lawyer's closing statement during the penalty phase constituted ineffective assistance of counsel. Also, we do not reach appellant's contention that the prosecutor's statements to the jury during sentencing violated the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5612

THEODORE CHRISTOPHER HARRIS,
Petitioner-Appellant,

vs.

RICHARD DUGGER, Secretary, Department of Corrections,
State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,
Respondents-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC
(Opinion May 16, 1989, 11 Cir., 198___, ___F.2d_____).
(August 17, 1989)

Before HILL, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/JAMES C. HILL
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1220-CIV-PAINE

THEODORE CHRISTOPHER HARRIS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
RICHARD DUGGER, Superintendent,
Florida State Prison at Starke, Florida and
ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Respondents.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Before the court is a petition for Writ Habeas Corpus in which relief is requested pursuant to 28 U.S.C. § 2254. The petition initiating this action was filed in this court on Friday, July 1, 1988. The case was assigned to the undersigned District Judge.

In 1981, Petitioner was convicted of First Degree Murder, Burglary of a Dwelling with a Dangerous Weapon and with an Assault, and Robbery with a Dangerous Weapon. The jury recommended the death penalty for the stabbing murder of the 73 year old Essie Daniels. The trial judge sentenced Petitioner to death on the Murder count and 100 years, consecutively, on the two additional counts. Petitioner's conviction and sentence were upheld by Florida Supreme Court. *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied* 466 U.S. 963 (1984). Petitioner sought a writ of

habeas corpus from the Florida Supreme Court based on ineffective assistance of appellate counsel which was denied. *Harris v. Wainwright,* 473 So.2d 1246 (Fla. 1985). Petitioner then sought post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Petitioner raised twenty issues. After an evidentiary hearing, Petitioner's requested relief was denied. Petitioner appealed to the Florida Supreme Court. On appeal two major issues were addressed. The other eighteen were merely mentioned summarily. On July 1, 1988, The Florida Supreme Court affirmed the trial court's denial of post conviction relief pursuant to Fla. R.Crim.P. 3.850. *Harris v. State,* No. 72,589 (Fla. July 1, 1988). The same day Petitioner filed his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and application for a stay of execution with this court. Petitioner's death warrant is returnable Friday, July 8, 1988 at 7:00 A.M.

A hearing was scheduled and orally noticed to counsel for the parties at 11:00 A.M. Tuesday, July 5, 1988. Counsel appeared presenting the positions of their clients to the court. Petitioner had filed a brief in support of the petition with the petition. Respondent filed written response at the hearing and, later in the day supplemented that response with an additional written submission.

A prerequisite to considering a federal habeas corpus petition is exhaustion of state remedies. 28 U.S.C. § 2254(b). Since this petition raises issues which were exhausted and issues which were not exhausted in the state proceeding, Petitioner's application for a writ of habeas corpus is a mixed petition. As such, the petition must be dismissed for failure to exhaust state issues in the state forum. *Rose v. Lundy,* 455 U.S. 509 (1982). However, the state has the prerogative and discretion to waive the exhaustion requirement. *Thompson v. Wainwright,* 714 F.2d 1495, 1501 (11th Cir. 1983). The State of Florida has waived the exhaustion requirement in this case. See Waiver of Exhaustion (De 27).

The Court, in its discretion, accepts the waiver of the exhaustion requirement by the State of Florida.

Therefore, the Court may address the merits of Petitioner's application for writ of habeas corpus. Petitioner has raised the following points:

A. that the conviction be vacated because the confession was obtained under circumstances that violated his constitutional rights;

B. that the failure to suppress the confession violated the Fifth Amendment;

C. that protracted interrogation before initial appearance in return of the warrant violated Petitioner's right to counsel;

D. exclusion of death-scrupled jurors;

E. improper comment on silence;

F. ineffective assistance of counsel due to failure to secure a defense serologist or orthopedist;

G. failure to charge the jury on lesser included offenses;

H. ineffective assistance of counsel by failure to request jury instructions on lesser included offenses;

I. ineffective assistance of counsel regarding the penalty phase;

J. ineffective assistance of counsel during summation at the penalty phase;

K. violation of due process and the Eighth Amendment by improper comment by prosecutor on the jury's role in the sentencing process;

L. violation of due process and the Eighth Amendment by improper argument by prosecutor in penalty phase;

M. trial judge's instruction on "heinous, atrocious, and cruel" aggravating factor;

N. violation of due process and the Eighth Amendment by improper instructions on aggravating circumstances;

O. violation of due process and the Eighth Amendment by failure to instruct the jury that it could recommend life even if no mitigating factors were found;

P. lack of independent judicial consideration of the propriety of the death sentence violated the Eighth and Fourteenth Amendments;

Q. violation of Fifth, Eighth and Fourteenth Amendments due to failure to conduct proportionality review;

R. ineffective assistance of counsel at appellate stage for failure to challenge adequately the arrest warrant;

S. unconstitutional presumption in favor of death for felony-murder convictions;

T. unconstitutionality of Florida's death penalty by arbitrary and inconsistent application;

U. trifurcated system of capital sentencing unconstitutionally disperses decision making authority; and

V. loss of Petitioner's life.

The points raised in two categories shall be discussed: the confession (Points A, B, C) and ineffective assistance of counsel (Points F, H, I, J, R).

* * *

Petitioner posits that he was not afforded effective representation in that:

a. Defense counsel failed to secure the services of a serologist to review and evaluate the work of witnesses called by

the state who offered evidence identifying blood specimens found by investigators.

b. Defense counsel failed to procure an orthopedic specialist to analyze pertinent medical records and to examine Harris' hand.

c. Defense counsel failed to request jury instructions on lesser included offenses.

d. Defense counsel failed to marshal and offer evidence in mitigation at the penalty phase of the trial.

e. Defense counsel made prejudicial, false and inflammatory statements in summation at the penalty phase in which he incorrectly stated that Petitioner's family had "turned against him" and by suggesting, without factual foundation, that Harris' conduct might have resulted from the use of drugs.

f. Defense counsel failed to adequately challenge the allegedly unlawful arrest warrant.

The controlling case on the issue of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). This precedent requires that, to set aside a death sentence, a defendant must demonstrate that counsel's work was deficient and that prejudice resulted so as to deprive defendant of a fair trial.

The submissions of counsel and the record of prior proceedings have been studied and considered. The constitutional guarantees asserted to have been violated have been examined together with interpretations by many case opinions of the Supreme Court of the United States and by the Fifth and Eleventh Circuits.

The constitutional right to a competent attorney does not insure that defense counsel will raise every conceivable position which a defendant may assert *Jacobson v. Wain-*

wright, 450 So.2d 200 (Fla. 1984); *cert. denied,* 469 U.S. 1062 (1984). Decisions of the trial attorney which may not be criticized in the light of subsequent occurrences, unless no competent attorney would have utilized such a decision. *McNeal v. Wainwright,* 722 F.2d 1443 (11th 1984); *Adams v. Wainwright,* 709 F.2d 1443 (11th 1983), *cert. denied,* 104 S.Ct. 745 (1984).

Under the circumstances of the trial of this case it is clear that the defendant did not suffer ineffective assistance of counsel during the trial phase. The charge of ineffectiveness of counsel is presented with greater force as to the penalty phase. However, even there, the alleged deficiencies of counsel in failing to present witnesses and documentary evidence in mitigation do not support the conclusion that constitutional rights were violated. An attorney's decision not to interview witnesses, but to rely on other sources of information, when made in the exercise of professional judgment, does not equal ineffective assistance. *United States v. Chancy,* 446 F.2d 571 (3rd 1971). While the two lawyers representing Harris seemed to have thought that the other was responsible for the preparation for the penalty hearing, it is clear that some efforts were made to produce witnesses. More, perhaps, could have been done. But there is no proof that such additional efforts would have produced a different result. Perfection in preparation and presentation is not required by the United States Constitution.

Argument by defense counsel at the penalty phase that the defendant was not guilty in the face of a jury verdict to the contrary does not constitute ineffective assistance. *Funchess v. Wainwright,* 772 F.2d 683 (11th 1985). Even harsh comments by defense lawyers during summation do not require reversal. *Darden v. Wainwright,* ___ U.S.___ 106 S.Ct. 2464 (1986). *Thompson v. Wainwright,* 787 F.2d 1447 (11th 1986).

The assertion that petitioner was deprived of constitutional rights by appellate counsel is found to be wholly without merit in the light of a review of the petitioner's record on appeal to the Florida Supreme Court.

The remaining issues raised (Points D, E, G, K, L, M, N, O, P, Q, S, T, U and V) have been reviewed and it is determined that they are without merit.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's application for a Stay of Execution is GRANTED.

ORDERED AND ADJUDGED that Petitioner's application for a Writ of Habeas Corpus is DENIED.

ORDERED AND ADJUDGED that the issues presented are such that this Court certifies that there is probable cause for review by the Court of Appeals.

DONE AND ORDERED at West Palm Beach, Florida this 6th day of July, 1988.

/s/ James C. Paine
James C. Paine
United States District Judge

cc: Daniel L. Rabinowitz, Esq.
Charles M. Fahlbusch, Esq.
Assistant Attorney General

SUPREME COURT OF FLORIDA

No. 72,589

THEODORE C. HARRIS, Appellant,
vs.
STATE OF FLORIDA, Appellee.

[July 1, 1988]

OVERTON, J.

In this postconviction relief proceeding, Theodore C. Harris appeals the denial of his Florida Rule of Criminal Procedure 3.850 motion to vacate his conviction and sentence of death, and also seeks a stay of execution from his death warrant. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the trial court's denial of the requested relief and deny the stay of execution.

This is Harris' first death warrant but his third appearance before this Court. We affirmed his conviction and sentence of death in *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied,* 466 U.S. 963 (1984). As reflected in that decision:

> The victim, a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1981. She had died during the night from multiple stab wounds and wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was splattered over the walls and furnishings of the bedroom, living

> room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.

Id. at 789. At the time of the murder, Harris was living with the victim's granddaughter in the same neighborhood. He had previously been married to that granddaughter's sister. Harris had signed a written confession which was fully set forth in our prior opinion. He presented no evidence in his own behalf in the guilt phase of the trial.

During the penalty phase, the state presented evidence that Harris had been previously convicted of robbery and that he was on parole at the time of the murder. At the conclusion of the penalty phase, defense counsel requested a continuance to bring Harris' ex-wife, other family members, and a minister from Jacksonville to testify in Harris' behalf. When the court reconvened, counsel advised the court the ex-wife was hospitalized and he had been unable to contact the minister. As a result of the unavailability of these witnesses, Harris presented no evidence in mitigation during the penalty phase. We affirmed the imposition of the death sentence and agreed that the following aggravating circumstances applied: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) the murder was committed while Harris was engaged in committing a robbery or burglary; and (4) the murder was especially heinous, atrocious, and cruel. We rejected the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner, but concluded that the improper finding of this aggravating circumstance did not require a new sentencing proceeding. *Id.* at 798.

Subsequently, Harris petitioned this Court for a writ of habeas corpus, claiming he was denied effective assistance

of counsel during his direct appeal on the grounds his attorneys "failed to adequately challenge the validity of the affidavit of probable cause that supported the warrant for his arrest." *Harris v. Wainwright*, 473 So.2d 1246, 1247 (Fla. 1985). We rejected that claim, noting that Harris was seeking a second review of an issue which was previously raised and expressly addressed by the Court. Further, we found that his counsel was not ineffective and that the allegations did not establish prejudicial appellate counsel deficiencies.

This 3.850 motion raises multiple issues, fifteen of which the trial court rejected because they were "either barred on the grounds of res judicata, collateral estoppel and the law of the case, having previously been ruled upon [by this Court, or that they were] procedurally barred because they were issues which could have and should have been raised on direct appeal but were not and which were not properly preserved by request or objection at trial." The trial court held an evidentiary hearing regarding the ineffective assistance of counsel claims and, in denying relief, concluded that "defense counsel did not commit any deficiency below the standards expected of counsel." In addressing the question of whether Harris was prejudiced because of the failure to present certain testimony, the court concluded that "the testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached."

This appeal addresses principally the claim that trial counsel was ineffective in failing to properly investigate and obtain character evidence through Harris' service and school records and from members of his family and former employers. Harris also claims that his trial counsel was ineffective in the manner in which he argued the case before the jury.

These ineffective assistance of counsel claims are governed by the principles set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In determining ineffectiveness of counsel, the issue is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 669, 104 S.Ct. at 2055. To reverse a conviction or set aside a death sentence on these grounds, the defendant must show "first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.* Further, "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2068. The *Strickland* Court noted that, in answering the question, a court need not first determine whether counsel's performance was deficient before examining whether the claimed deficiency resulted in prejudice to the defendant. We previously explained how the *Strickland* test is to be applied in *Downs v. State,* 453 So.2d 1102 (Fla. 1984).

The claim of ineffectiveness presented in *Strickland* asserted that counsel was deficient in failing to investigate and present character witnesses and obtain a psychiatric report for the defendant. The evidence that was alleged should have been presented in *Strickland* would have shown that numerous people thought the defendant was generally a good person and that a psychiatrist and psychologist believed he was under considerable emotional stress. The United States Supreme Court rejected this claim, noting that the evidence would not have sufficiently altered the sentencing profile and, because of the aggravating factors,

there was no reasonable probability that the omitted evidence would have changed the conclusion.

The claim in Harris' case is similar. He asserts counsel was ineffective for failing to have presented certain mitigating evidence. He argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.

He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.

To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the state to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse. These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three year-old woman had six stab wounds and forty-one incisions wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have

affected the jury's recommendation or the sentence imposed by the trial judge. *See, e.g., McCrae v. State,* 510 So.2d 874 (Fla. 1987); *Maxwell v. Wainwright,* 490 So.2d 927 (Fla.) *cert. denied,* 107 S.Ct. 474 (1986); *Porter v. State,* 478 So.2d 33 (Fla. 1985). We also reject as without merit the claim that his counsel's argument in the penalty phase was so ineffective that it requires a new sentencing proceeding.

Accordingly, we affirm the trial court's order and deny Harris' application for a stay of execution.

It is ordered.

McDONALD, and GRIMES, JJ., concur

EHRLICH, C.J., concurs specially with opinion SHAW, J., concurs specially with opinion with KOGAN, J., concurs KOGAN, J., dissents with opinion with which BARKETT J., concurs NO MOTION FOR REHEARING WILL BE CONSIDERED.

EHRLICH, C.J., specially concurring.

While I concur with the Court's opinion and with the special concurring opinion of Justice Shaw, I would like to express an additional thought or two.

It should be apparent from the reading of the opinions of this Court in death penalty cases that this Court expects the same high standards of professional competence in the preparation for and the conduct of the penalty phase of the trial, as it does in the guilt phase. This is not to say that counsel for a defendant may not exercise a reasonable judgment and decide not to put on any witnesses, or to put on a limited number of witnesses designed to "humanize" the defendant, or at least to show that there is sufficient good in the otherwise tainted character of the defendant that the death penalty would be inappropriate. But, it is elementary that reasoned judgment cannot be made and options exercised unless and until a complete investigation into the defendant's background and past have been made. I recognize also that counsel has to weigh the good against the bad and decide whether presenting the good side of defendant will outweigh the adverse evidence that may come in by way of cross examination or rebuttal, and that if he feels that under such circumstances it would adversely affect defendant to put on such positive evidence, that he should not do it.

It appears to me that in addition to a complete investigation into defendant's background and character, that it is also necessary to explore the defendant's mind to ascertain if there be present any evidence that would call into play a statutory mitigating factor, or any non-statutory mitigating circumstances.

Since so much time generally elapses between the original trial date and time of collateral proceedings raising the inevitable charge of ineffective assistance of trial counsel, I

think that counsel would be well advised to save his or her file so that when called upon the testify in response to the charge of ineffective assistance, that counsel will not have to depend solely on a memory possibly dulled by the passing of time.

SHAW, J., specially concurring.

Although I agree that relief should be denied because appellant has not shown prejudice resulting from the alleged ineffectiveness of counsel, I believe something should be said about counsel's performance. From the testimony of the two defense attorneys at the evidentiary hearing below, it is obvious that both believed that the other was contacting witnesses in preparation for the penalty phase and, consequently, neither was prepared when the penalty phase arrived. Because of this, a continuance was obtained and efforts made to contact witnesses. This lack of attention and preparation reflects inadequate assistance of counsel even if it did not result in constitutional ineffectiveness under the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice prong.

EHRLICH, C.J., concurs

BARKETT, J., dissenting.

I respectfully but emphatically dissent. In my view, this case presents a glaring example of prejudicial ineffectiveness. Contrary to what the majority opinion suggests, Harris presented no evidence during the penalty phase not because of the unavailability of witnesses but because his two lawyers, prior to the day the penalty phase began, had not devoted a single hour of their time to preparing for that phase of the trial. And, as the testimony at the evidentiary hearing below made clear, defense counsels' complete and utter failure to investigate, prepare, or present mitigating evidence during the penalty phase was not the result of a reasoned strategic decision but was due to the fact *each believed the other was preparing the penalty phase of the trial.* The testimony at the hearing below was unequivocal on this point: Both attorneys testified that they erred, that their conduct was below acceptable norms, and that they would have presented the mitigating evidence now brought to light had they known of its existence.

It cannot be denied that such conduct falls far short of *Strickland's* requirement of reasonably adequate assistance. As the Supreme Court noted in *Strickland,* "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgements." *Id.* In this case, because each counsel believed the other was responsible for the penalty phase, there was no decision not to investigate. Counsels' failure most clearly was not the result of reasoned professional judgement, and, in my view, "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. *See also Blake v. Kemp,* 758 F.2d 523, 533 (11th Cir.

1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness"), *cert. denied,* 474 U.S. 998 (1985). Courts have found deficient performance based upon errors less far-reaching than counsel's error in this case. *See Tyler v. Kemp,* 755 F.2d 741 (11th Cir. 1985); *Armstrong v. Dugger,* 833 F.2d 1430 (11th Cir. 1987); *King v. Strickland,* 748 F.2d 1462 (11th Cir. 1984), *cert. denied,* 471 U.S. 1016 (1985).

Turning to the second prong of the *Strickland* test, I cannot agree that Harris was not prejudiced by his counsels' deficient performance. My reasons are threefold: first, without hearing any evidence in mitigation whatsoever during the penalty phase, four of the twelve jurors voted for life imprisonment.

Second, the circumstances of the murder in this case differ markedly from those in *Strickland.* In *Strickland,* the defendant planned and committed a series of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. 466 U.S. at 671-72. Furthermore, the defendant in *Strickland* confessed and pleaded guilty to all charges, then waived his right both to a jury trial and a penalty phase advisory jury. *Id.*

In contrast, the murder here was not planned but resulted from a burglary gone awry. The evidence indicates that Harris entered the victim's house believing it to be unoccupied and was surprised by the victim. In the ensuing struggle, the victim was killed and Harris himself injured. Under such circumstances, I believe there is a reasonable probability that character testimony might have affected the outcome.

Third, I do not agree that because the state may have sought to introduce evidence of prior bad acts by Harris, Harris was not prejudiced by the absence of the character evidence. Harris stood convicted of the stabbing murder of any elderly woman. The jury already knew he was on parole at the time.

Thus, the jury was aware of much that was damaging to Harris. The testimony of his family and friends, however, would have presented another side to Mr. Harris' character, demonstrating that he was not totally reprehensible and, even in prison, his life could serve some useful purpose. Rehabilitative potential unquestionably is valid mitigating evidence. *Skipper v. South Carolina,* 476 U.S. 1 (1986); *McCampbell v. State,* 421 So.2d 1072, 1075-76 (Fla. 1982). Regardless of how any particular individual might weigh this testimony, it clearly is the type of mitigating evidence that might persuade a jury that death is not the appropriate penalty. Juries have recommended life sentences under similar circumstances. *See, e.g., Holsworth v. State,* 522 So.2d 348 (Fla. 1988).

I also believe that this case involves more than a mere weighing by this Court of the aggravating and mitigating circumstances. As the Court admonished in *Strickland,* "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Because his lawyers abdicated their responsibility to investigate or prepare mitigating evidence, Harris received virtually no defense at all in the penalty phase of his trial. Although counsel presented a closing argument at the penalty phase, counsel may well have done Harris more harm than good by arguing, falsely, to the jury that Harris' family had turned against him, since jurors may have interpreted this to mean he was irredeemable.

A death sentence imposed where counsel's representation amounts to practically no representation at all does not comport with the eighth amendment's requirement of reliability in capital sentencing. As the Supreme Court relentlessly has emphasized in its capital decisions, one of the key aspects of the penalty phase proceeding is that the sentence be individualized. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). As the Court noted in *Woodson v. North Carolina,* 428 U.S. 280, 298 (1976) (quoting *Furman v. Georgia,* 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)), "individual culpability is not always measured by the category of the crime committed." For this reason, the death penalty may not be imposed without some "particularized consideration of relevant aspects of the character and record of each convicted defendant." 428 U.S. at 303 (plurality opinion). In this case, counsel failed to provide the jury with the information it needed to focus properly on the individualized characteristics of this appellant. *See Armstrong,* 833 F.2d at 1433.

Accordingly, I conclude that confidence in the outcome has been undermined, and I would vacate the death sentence and grant appellant a new sentencing proceedings.

KOGAN, J., concurs

KOGAN, J., dissenting.

I concur with Justice Barkett's dissenting opinion. I would further point out that during his closing argument to the jury, appellant's trial counsel stated the following:

> I am nor going to tell you — to stand here and talk to you about proof, what's been reasonable doubt, *but I ask you to consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because of this act. He's always — and they have been against him since then.* Mr. Darby [Assistant State Attorney] asked — who comes in here to speak for him? Think about that. They don't want to be against him. They don't want to be for him.

This assertion, as the testimony of the witnesses at the 3.850 hearing demonstrated, was incorrect. Appellant's family and friends were not present at trial to testify on his behalf because counsel failed to properly prepare for the penalty phase portion of the trial.

Not only was appellant deprived of his right to present friendly witnesses on his behalf, but his own counsel inferred that the act for which appellant was convicted was so offensive that his family turned against him and would not appear in court to testify. There can be no question that counsel's statement severely damaged any chance appellant had for a recommendation of life imprisonment. This ineffective assistance of counsel was highly prejudicial to appellant.

I would vacate the sentence of death and remand this matter for a new sentencing proceeding before a new jury.

BARKETT, J., concurs

An appeal from the Circuit Court in and for Dade County Ellen J. Morphonios, Judge - Case No. 81-7561.

Daniel J. Rabinowitz and Keith E. Lynott of McCarter & English, Boca Raton, Florida and Newark, New Jersey, for Appellant.

Robert A. Butterworth, Attorney General, Charles M. Fahlbusch, Assistant Attorney General, and Richard L. Kaplan, Capital Collateral Coordinator, Miami, Florida, for Appellee.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 81-7561

THE STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE CHRISTOPHER HARRIS,

Defendant.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court upon the motion of the defendant, THEODORE CHRISTOPHER HARRIS, for Post Conviction Relief, on June 6, 1988 at approximately 3:00 p.m., and continuing through June 7, 1988, and the court having reviewed the Record and Transcripts, having heard the testimony of witnesses, having reviewed the pleadings and being, otherwise, fully advised in the premises, it is hereby ORDERED AND ADJUDGED, as follows:

1. With regard to the allegations of ineffective assistance of counsel during the penalty phase of the trial for failure to discover and present mitigating evidence during the penalty phase of the trial (Issue (A.a) and for an ineffective penalty phase summation (Issue A.b.), this Court finds that the defense trial counsel did not commit any deficiency below the standards expected of counsel.

Further, the testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached.

Therefore, even if some act or omission of trial counsel could be considered to have been deficient, such deficiency could not have prejudiced the defendant.

2. With regard to the allegations of ineffective assistance of trial counsel during the guilt phase for counselling the defendant to waive his right to jury instructions on lesser - included offenses (Issue C.g.) and for failure to procure the services of experts (Issue C.h.), no evidence was presented that these acts constituted ineffectiveness of counsel and, in fact, the only evidence presented on the issue was that trial counsel was effective during the guilt phase of the trial. This Court finds that trial counsel was effective during the guilt phase of the trial.

3. Further, this Court finds, with regard to each of defendant's allegations of ineffective assistance of counsel, that defendant has not demonstrated that he was prejudiced thereby, as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

4. No evidence was presented that the defendant was prejudiced in any manner by the alleged loss of the Public Defender's file and this motion is denied on that ground, as well. (Issue D).

5. Five (5) of the remaining fifteen (15) issues of the motion are barred on the grounds of res judicata, collateral estoppel and law of the case, having been previously ruled upon, against the defendant, by the Florida Supreme Court. Specifically, Issues A.c., C.a., C.b., C.d. and C.F. of the Motion.

6. The remaining ten (10) issues of the motion are procedurally barred because they were issues which could have and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial. Specifically, Issues A.d., A.e., A.f., A.g., A.h., B.a., B.b., B.c., C.c. and C.e. of the Motion.

DONE AND ORDERED at Miami, Dade County, Florida this 13 day of June , 1988.

/s/ Ellen J. Morphonios
JUDGE OF THE CIRCUIT COURT

cc: Daniel Rabinowitz
David Gilbert
Charles M. Fahlbusch

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 81-7561 (Morphonios)

THE STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE CHRISTOPHER HARRIS,

Defendant.

The above-entitled cause came on for hearing before the Honorable ELLEN J. MORPHONIOS, Judge of the above-styled court, at the Metropolitan Justice Building, 1351 N. W. 12th Street, Miami, Florida, on June 7, 1988, pursuant to notice.

APPEARANCES:

Office of the State Attorney
1351 N. W. 12th Street, Room 600
Miami, Florida 33125
BY: DAVID GILBERT
Assistant State Attorney on behalf of the State of Florida.

Office of the Attorney General
401 N. W. 2nd Avenue, Room N921
Miami, Florida 33128
BY: CHARLES M. FAHLBUSCH
and JONI BRAUNSTEIN
Assistant Attorney Generals on behalf of the State of Florida.

McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
BY: DANIEL L. RABINOWITZ, ESQ. on behalf of the Defendant.

* * *

Q. [David Gilbert, Prosecutor] If I understand you correctly, Mr. Fuller, you are telling this Court and would have been prepared to tell the jury in 1981 that you have no problems seeing Theodore Harris as a role model for your child?

MR. RABINOWITZ: Objection, Your Honor. That's a completely unfair characterization of what Mr. Fuller had to say.

THE COURT: Overruled. He said all the children looked up to him.

MR. RABINOWITZ: Your Honor, despite his inability to conform his conduct to the dictates of the law.

THE COURT: Ruling stands.

Q. You have no problem seeing Theodore Harris as a role model for your children; is that your testimony?

A. [Henry Fuller]: That's correct.

Q. Now, the man that you have chosen to be a role model for your children, do you know about his prior criminal record?

A. Yes, I do.

Q. You are aware that he was convicted of burglary prior to the time that he was convicted of this murder?

A. Yes.

Q. You are aware, then, that he was given probation on that burglary and violated it by committing another felony offense?

A. Yes.

Q. Before he committed this murder?

A. Yes.

Q. And you are further aware, then, that after committing those two felonies he then committed a robbery prior to this murder, making it a third felony that he has committed?

A. I did not know he had committed a robbery. If I had known that, maybe I would have known if I had been contacted through the court system here.

* * *

Q. [David Gilbert, prosecutor] Now, it is also your opinion, is it not, that Mr. Harris would never hurt anybody?

A. [Henry Fuller]: That's my opinion.

Q. And you registered this opinion despite the fact that he's committed two crimes of violence against another human beings?

A. Was it bodily harm?

Q. Do you know what the crime of robbery is?

A. Robbery, you could be snatching a pocketbook or something like that. It doesn't have to be violent. You mean physical?

Q. Under the law of Florida, a robbery requires either force, violence, putting someone in fear or assaulting them.

A. So does love, but explain yourself more thoroughly.

Q. So does love?

A. When people make love, sometimes they make it violently or romantically or passionately. Explain it deeper. I don't understand what you're talking about.

Q. I think we'll leave that area alone.

Now, you said that Theodore Harris is not a bad man?

A. No, I don't feel like he is.

Q. He stands convicted of a burglary, correct?

A. That's correct.

Q. He stands convicted of drug possession, correct?

A. I don't know about the drugs.

Q. A second felony which violated his probation?

A. Uh-huh.

Q. He stands convicted of robbing an elderly woman back in 1977 in Jacksonville?

A. Uh-huh.

Q. Do you know the facts of this murder? Do you know what was done to the victim in this case?

A. No. It was never presented to us in Jacksonville. If we had known that, maybe we would have known when to come to court.

Q. Did you know that the woman that was killed by Theodore Harris was a 73-year-old woman who was cut with a knife 50 times?

A. No, I didn't know that.

Q. Did you know that the woman that Theodore Harris killed was stabbed in the head five times?

A. No, I did not know that.

* * *

Q. [Daniel L. Rabinowitz]: How old were you in 1981?

A. [LaShawn Fuller]: I was 15.

Q. And were you close to Mr. Harris at that time as well?

A.. Yes, I was.

Q. Did anyone ever contact you—

A. No.

Q. —in 1981—

A. No.

Q. —about the possibility of testifying at Mr. Harris' trial?

A. No.

Q. Were you ever asked to come to Miami to testify about Mr. Harris' character?

A. No, I wasn't.

Q. Did you know back then that you could have come to Miami to testify about Mr. Harris' character and about your relationship to Mr. Harris in connection with the penalty phase of his trial?

A. No, I didn't.

Q. Did you know exactly when his trial took place?

A. No, I didn't.

Q. Did your parents know?

A. No, they didn't, also.

Q. Did anyone ever come to your house—

A. No.

Q. —or call your parents or call you on the telephone—

A. No.

Q. —about that?

Had you been asked to testify on Mr. Harris' behalf in 1981, would you have wanted to do so?

A. Yes.

Q. What would you have said to the Court, if you had been given the opportunity back then to testify?

A. I would have said he was a good uncle and he was a family man and he just was a good advisor for me during my career.

* * *

Q. [Daniel L. Rabinowitz]: How do you feel about Mr. Harris?

A. [Wayne Carswell] He's an excellent fellow. You know, I think about him, and he's the type fellow that I would trust, even with my family. If I had to go on a trip or something in the ministry, I would trust him to take care of my family while I'm gone.

Q. And yet you know of his long criminal record?

A. Yes, but I know him.

* * *

Q. [David Gilbert]: So back in 1981, at the time that you would have testified in this hearing had you been called, you had no knowledge that your dear and close friend had four prior contacts with the law before you employed him?

MR. RABINOWITZ: I'm going to object to the form of the question. The witness testified that he hired him when he was paroled from State Prison at that time.

THE COURT: Overruled.

Q. And at that time he had four convictions. You were unaware he had four criminal offenses on his record when you employed your good friend in 1981?

A. [Wayne Carswell]: I knew he had brushes with the law. Okay?

Q. Brushes?

A. Problems.

Q. Is that how you characterize a conviction for burglary of an automobile, a brush with the law?

A. Well, violation of the law if that's the word you're looking for, it was a violation of the law.

Q. It's a felony.

A. Well, I don't know about felonies or anything.

Q. After he was found guilty and put on probation for that burglary, did you offer him support and counseling as a friend?

A. Sure. I've always talked with him, yes.

Q. To try to get him back on the straight and narrow?

A. Sure, we've always talked.

Q. But he let you down while on probation by being caught for another felony while on probation, didn't he, or you didn't know about that?

A. I did not know.

Q. I see.

So after he let you down and was found guilty of a drug possession charge while on probation, do you know if you again supported him and tried to give him counseling as a friend to get him back on the straight and narrow?

A. Well, like I said, even if Theodore today needed a place to stay, he could stay with me.

Q. My question to you, sir, is after he was violated on probation and spent time in the County jail for violating his probation with another felony, did you again try to counsel him and keep him on the straight and narrow, sir?

A. Here, you mean—

Q. No, in Jacksonville.

A. In Jacksonville. Anytime I saw him, we would always talk, yes, anytime.

Q. And are you aware that after getting out of the County jail on the second felony he committed an assault and was convicted of a criminal assault and battery on another human being after that?

A. No.

Q. Are you aware that after that assault and battery he was again convicted of a felony of a robbery, which requires an assault, violence or threat against a human being while taking their property?

A. No.

Q. You were not aware—

A. No.

Q. —he had made two violent assaults on people?

A. No.

Q. And this murder would then become the third violent assault?

A. I didn't know about that.

Q. Well, okay. Do you know the facts of the murder? Do you know what he did?

A. No.

Q. No one's ever told you?

A. No.

Q. You said he had a great deal of respect for the church; is that correct?

A. Growing up he did, uh-huh.

Q. Can you explain, therefore, why he stole $30 of church money from a church bake sale?

A. No.

Q. Is there anything in his background that would explain that conduct as you know him?

A. No. The only thing, maybe if he got with the wrong group or something.

Q. So if this was done as a group crime, that might explain it, but if he acted on his own you have no explanation?

A. Like I said, if he had gotten around the wrong group and influenced by them.

Q. Do you know of anything in his background that would explain why he would inflict fifty knife wounds in order to take $30 from a member of the church?

A. No.

Q. Do you know of any reason in his background why he would stab a 73-year-old woman five times in the head to get $30 from her?

A. No.

Q. You still think he's somebody you trust your family with?

A. If I had to leave town today for the ministry and he was the only person in Jacksonville or if he was near, I would say, "Theodore, will you stay and watch my family while I'm away?" I still trust him.

Q. You still trust him.

A. I still trust him.

Q. Isn't there a darker side to Theodore Harris that you refuse to acknowledge?

A. I don't know of one.

Q. You don't consider a conviction for assault and battery, a conviction for robbery of an elderly woman and the conviction for murder and robbery of another elderly woman to be a dark side of a human being?

A. Well, you're just telling me these things and you're saying to me is there other things I want to disclose here today. I don't know of any other things.

Q. Assuming that the facts that I'm telling you are correct, is that not a dark side of a human being?

A. I can't disclose it. You've just shared that with me.

THE COURT: Did you know the lady killed was his wife's grandmother?

THE WITNESS: No.

* * *

THE COURT: All right. With regard to Case Number 81-7561 the Court is completely familiar with Mr. Al Williams as a trial attorney. I'm not that familiar with Pedro Echarte. I know who he is, but if I've had him practicing before me I frankly don't remember it, which means nothing against him, but I am thoroughly familiar with Mr. Al Williams. He's a very thorough attorney. He has been ever since I've known him. He's a good attorney.

I share with Mr. White the statement that I don't believe Mr. Williams would ever come in here and say something that was inaccurate, not true, hedged or shaded; however you might want to use the phrase. I think that the investigator that was working with Mr. Echarte and Mr. Williams, just as Mr. Williams testified, was diligently trying to locate members of Mr. Harris' family, not members of Mrs. Harris' family, but members of Mr. Harris' family.

I think that a number of the people whose names have been mentioned were made known to Mr. Williams, Mr. Carswell, Mrs. Harris, and frankly I think there was another one whose name escapes me at the moment.

Be that as it may, I think that Mr. Williams, as he stated, regardless of between Pedro Echarte and Mr. Williams as to who thought they were the supreme being in the making of decisions, Mr. Williams very accurately said, "No matter which one of us is making the decision, I am the senior Public Defender, I am responsible for anything Mr. Echarte does and I am responsible for anything the Public Defender investigator does."

I think that Mr. Williams had intended to put on witnesses, if they were available, with regard to Mr. Harris' background. They were not available. Some of them didn't show up that he knew about.

Mrs. Harris, who according to Al Williams was a little wishy-washy with the investigator as to whether she would or would not testify for Mr. Harris, solved the matter simply by being in the hospital and unable to testify for anybody about anything and avoided the entire issue. I'm not saying she did that deliberately, but it conveniently got her out of a pickle.

I think Mr. Williams made a tactical decision forced upon him by the fact that the people from Jacksonville never showed up and he made a decision to rely on hopefully hitting the sympathy on behalf of the jury by pointing out that Mr. Harris had a deprived background type and that he did not have his family with him and was seeking the sympathy of the jury and hoping that the jury would decide that he's a poor put-upon human being and was, therefore, forced into these acts by reason of his background.

I think Mr. Williams was fully, completely, 1,000 percent aware that if he put on character witnesses, that Mr. Harris' less than admirable background was going to be jammed down the throats of the jury, which would have been not helpful to Mr. Harris in a penalty phase.

What I'm doing obviously is thinking out loud and the final question will be what have I missed that you want me to comment upon?

With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdict.

I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine

person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.

They knew he had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.

I don't think the testimony of any of the witnesses heard here today would have altered in any way, shape of form the verdict that the jury reached in 1981.

With regard to this case, 81-7561, the motion is denied.

If there is anything that you gentlemen, either one of you or all of you, wish me to comment upon so that whoever reviews this has the benefit of whatever thinking I might have, I'll be happy to do that.

* * *